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Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT UNITED STATES SENATE

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REPLY BRIEF OF APPELLANT UNITED STATES SENATE

This reply addresses three issues: (1) plaintiffs' contention, rejected by the United States, that the Act unconstitutionally delegates legislative power; (2) the argument of the United States, not joined by the plaintiffs, that the Act may be administered only by an officer who serves "at the pleasure of the President"; and (3) the contention of all appellees that the fallback procedure requires the invalidation of the Act's reporting procedures. With regard to other issues, we join the replies of the Comptroller General and the House.

In an addendum to this reply we have reproduced the Third Circuit's decision in *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, Nos. 85-5226 & 85-5377 (Mar. 27, 1986), issued after the filing of appellants' opening briefs. In that case, the Executive branch is challenging the constitutionality of provisions of the Competition in Contracting Act of 1984 which stay executive procurements pending the Comptroller General's disposition of timely bid protests. 31 U.S.C. 3553-3554. Even though the Comptroller General's ultimate disposition of bid protests is recommendatory only, the Executive branch is contesting the stay provisions on the ground that control over the timing of procurements is an executive function, which cannot be performed by the Comptroller General.

Because the Executive's challenge in *Ameron* presaged its arguments in this Court, *see* U.S. Br. 30-44, 51-55, the Third Circuit's convincing rejection of them is of great importance to these appeals. The court rejected the Executive's reliance both on "dicta and conclusory statements" about the Comptroller General (slip op. at 14) and on the existence of the legislative removal provision as probative of the Comptroller General's constitutional status. *Id.* at 14-18. The court held that the removal provision's lack of use over sixty-five years renders the removal question unripe, *see* Sen. Br. 25-29, and took specific issue with the conclusion of the district court in this

case that *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), supports a facial adjudication of the removal question. Slip op. at 17–18. The Third Circuit held further that, even if the removal issue were justiciable and the provision were found to be unconstitutional, the remedy would be "not to hold the 'stay' powers of the Comptroller General to be unconstitutional, but to sever as unconstitutional the provision which grants Congress the power to remove him." *Id.* at 18. Finally, the court sustained the Comptroller General's exercise of delegated executive functions because he is appointed by the President and he exercises his statutory duties independently. *Id.* at 19–25.

I. THE DISTRICT COURT CORRECTLY DECIDED THAT CONGRESS MADE THE CRITICAL LEGISLATIVE JUDGMENTS AND THAT THE ACT DELEGATES NO POLICY-MAKING POWER

As an alternative, and in their view preferred, ground for affirmance, plaintiffs claim that the Act unconstitutionally delegates legislative power by vesting in an administrative official the authority to determine whether projected deficits require application of the Act's standby administrative deficit reduction mechanism. Synar Br. 21–42; NTEU Br. 8–33. The district court soundly rejected this claim because "Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.[1] We rely principally on the district court's considered disposition of plaintiffs' claim, J.A. 38–55, and here only highlight several of the reasons for upholding this portion of its decision.

Plaintiffs allege that the "one purpose" for creating the standby administrative mechanism was "to lower the budget deficits without requiring members to vote for spe-

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[1] The United States agrees that the assignment to the Comptroller General "of the authority to make the economic calculations that determine the estimated federal deficit and the required budget cuts does not constitute an unconstitutional delegation by Congress of the 'legislative Powers' vested in it by Article I, Section 1, of the Constitution." U.S. Br. 11 n.8.

cific spending cuts or tax increases." Synar Br. 23-24; *see also* NTEU Br. 13. In their view, "this motive of avoiding political responsibility alone is enough to set aside the delegation." Synar Br. 31. However, as Justice Brandeis has observed, "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress." *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 161 (1919). Furthermore, plaintiffs' supposition about the "one purpose" of the majorities in each House which coalesced in support of this legislation fails to appreciate the expressed objectives of the Act's proponents. They made clear their expectation that the standby administrative mechanism would be a "disciplining agent" to promote, not to avoid, responsibility in enacting the budget, by providing the Congress and the President with certain knowledge of the consequences of any failure to develop legislation adhering to the maximum deficits established by the Act. Sen. Br. 12, 42-43.

Congress made the specific policy judgment that the health of the nation's economy requires that the federal government gradually reduce its budget deficit to achieve a balanced budget by October 1, 1990, and Congress precisely "prescribed the method of achieving that objective." *Yakus* v. *United States*, 321 U.S. 414, 423 (1944). First, Congress has established a statutory ceiling on the size of the deficit for the present and the next five years. Second, Congress has established a standby mechanism, including detailed procedures and schedules, for the execution of the deficit reduction necessary to achieve the deficit ceilings. Third, Congress has required, if sequestration is triggered, that the expenditure reductions be achieved through equal sacrifice on the defense and nondefense sides of the budget. Fourth, Congress has stipulated that, subject to its legislated exceptions, the sacrifice from any sequestration must be spread uniformly across every account and program in the budget. Viewing these elements of the Act in combination, Congress has made

the "important choices of social policy." *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment).[2]

Plaintiffs challenge only one aspect of the delegation to the Comptroller General, namely the task of projecting the annual federal budget deficit and comparing that deficit estimate to the deficit ceiling legislated in the Act.[3] Economic forecasting is neither simple nor precise, but undisputedly requires judgment about many complex issues. Nevertheless, the task remains one of the expert estimation of facts, which Congress may properly assign to an administrative agency. "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment. . . ." *Yakus,* 321 U.S. at 425.

The Comptroller General's duty is to estimate the magnitude of the anticipated deficit based on the revenue and expenditure choices that Congress has made; he is not asked to determine the size of the deficit that he believes would be best for the economy. An agency like the Federal Reserve Board wields "substantial economic power" through its exercise of the delegated authority to conduct the nation's monetary policy.[4] In contrast to such delegations of policy-making authority, "the *only* discretion conferred [upon the Comptroller General in the Act] is in the

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[2] The district court held that "[t]hrough specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.

[3] Plaintiffs do not challenge on grounds of excess delegation the Comptroller General's duty to allocate any required spending reduction among the government's financial accounts, presumably because they recognize that the comprehensiveness and detail of Congress' stipulations governing the distribution of spending reductions would undermine the viability of any such challenge.

[4] *Riegle* v. *Federal Open Market Committee,* 656 F.2d 873, 875 (D.C. Cir.), *cert. denied,* 454 U.S. 1082 (1981).

ascertainment of facts and the prediction of facts. The Comptroller General is not made responsible for a single *policy* judgment." J.A. 51 (emphasis in original; footnote omitted). Whatever amount of discretion the Comptroller General must exercise, for example, in order to *forecast* interest rates, a task to which plaintiffs specifically object, *see* Synar Br. 9, that discretion pales in comparison to the discretion that Congress has delegated to the Federal Reserve Board to *determine* interest rates.[5]

As the district court observed, the fact-finding task delegated to the Comptroller General in the Deficit Control Act contrasts sharply with previously sustained assignments of policy-laden duties to determine "what is a 'fair price,' *see Yakus*, 321 U.S. at 414, or when it would be 'appropriate' to freeze wages and prices, *see Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court), or wherein lies the 'public interest,' *see National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943)."[6] The district court

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[5] Congress has provided the Federal Reserve with three discretionary means to control monetary policy: setting the interest rates at which member banks borrow from it, 12 U.S.C. 248(b), imposing reserve requirements for member banks, *id.*, § 463, and engaging in open-market purchases and sales of financial obligations to control "the general credit situation of the country," *id.*, §§ 263, 353–359. *See generally Reuss* v. *Balles*, 584 F.2d 461, 462–65 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978) (describing Federal Reserve Board's functions in conducting national monetary policy).

[6] J.A. 51. In *Yakus* the Court upheld a statutory delegation to the President of the authority to "fix[ ] prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.' " 321 U.S. at 420 (quoting Emergency Price Control Act of 1942). In *Amalgamated Meat Cutters* a three-judge district court sustained Congress' grant of authority to the President to freeze virtually all prices and wages in the economy. Unlike the price control law sustained in *Yakus*, the statute upheld in *Amalgamated* provided the President with the sole discretion to determine whether to impose a wage-price freeze, "if the President should wish to adopt that prescription, following his further reflection and taking into account future developments and experience." 337 F. Supp. at 751. In *National*

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correctly concluded that, in comparison, "the present delegation is remote from legislative abdication." J.A. 51. The delegation is constitutional because Congress has made the "fundamental policy decisions underlying [this] important legislation." *Industrial Union Department*, 448 U.S. at 687 (Rehnquist, J., concurring in judgment).[7]

II. THE CONSTITUTION DOES NOT REQUIRE THAT THE COMPTROLLER GENERAL'S DUTIES UNDER THE ACT BE PERFORMED BY AN OFFICER SERVING AT THE PRESIDENT'S PLEASURE

The Executive branch advances the argument, which the district court did not reach, that the Comptroller General's duties "are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President." U.S. Br. 44. The adoption of this view would defeat the indispensable predicate of the Act's administrative mechanism, namely that economic projections and the application of the detailed procedures of the Act should *not* be used to implement the separate political judgments of *either* the Congress or the President but should implement only the policy that the Congress and the President together enacted into law.

A. The Independence Permitted by Humphrey's Executor is Critical to the Act's Neutral Implementation

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court sustained Congress' right to preclude the

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Broadcasting the Court upheld the delegation to the Federal Communications Commission of the authority broadly to regulate network radio to promote "public convenience, interest, or necessity." 319 U.S. at 214 (quoting Communications Act of 1934).

[7] The district court explained that, although the Comptroller General's delegated duty to estimate deficits "is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself." J.A. 54 (emphasis in original).

President from removing commissioners of the Federal Trade Commission in the absence of "inefficiency, neglect of duty, or malfeasance in office." [8] The Court described the Federal Trade Commission as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U.S. at 628. "We think it plain under the Constitution," the Court held, "that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named." *Id.* at 629. The Court has twice since confirmed its holding in *Humphrey's Executor*. *Wiener* v. *United States*, 357 U.S. 349, 352-56 (1958); *Buckley* v. *Valeo*, 424 U.S. 1, 136, 141 (1976) (per curiam).

The constitutionality of Congress' assignment of duties under the Deficit Control Act to the Comptroller General stands on an equal footing with the protections from removal conferred by Congress upon Federal Trade Commissioners and dozens of other Officers of the United States.[9] As the Third Circuit recently held, this Court's

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[8] 295 U.S. at 620 (quoting § 1 of FTC Act, 15 U.S.C. 41). The Budget and Accounting Act attempts to inhibit presidential removal for any reason. Although the Court has never addressed such a removal limitation, that issue is not currently before the Court, because the position of the United States is not that the President has the constitutional power to remove the Comptroller General for cause, but that an officer performing the Comptroller General's duties must be removable by the President without cause.

The question whether the Congress may entirely restrict the President's removal of the Comptroller General would be presented only if the President alleged that cause existed warranting his removal. If, in such a case, the Court were to sustain the President's removal of the Comptroller General and invalidate the statutory removal prohibition, the standard for presidential removal of the Comptroller General would continue to be for cause only. *See Wiener* v. *United States*, 357 U.S. 349 (1958).

[9] The list of officers who may not be removed at the will of the President includes the Governors of the Federal Reserve Board (12

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description of the Federal Trade Commission "provides a close analogy for describing the GAO and the Comptroller General: 'The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law.' " *Ameron*, slip op. at 21-22 (quoting *Humphrey's Executor*, 295 U.S. at 624).

Because of the Comptroller General's mission to discharge his assigned duties impartially and apolitically, his selection to administer the trigger was critical to Congress' adoption of the budget reduction mechanism. Unlike the Congress and its advisors and the President and his advisors, the Comptroller General is not a participant in the intensely political debate to establish the government's priorities and adopt a budget each year. Congress' legislative goal is that, if the Act's administrative mechanism needs to be employed, then it must be implemented in accordance with strictly neutral, professional economic forecasts and accounting judgments. The Congress effectuated this objective by providing that the Act's administrator, the Comptroller General, is not to make "a single *policy* judgment." J.A. 51 (emphasis in original). Because the Act contained Congress' " 'hard political choices' . . . to impose the severe constriction of federal spending" and to determine "which program budgets will be reduced in order to achieve that result, and by how much" (J.A. 54), Congress refrained from delegating any authority to diverge from those policies incor-

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U.S.C. 242) and the Postal Service Board (39 U.S.C. 202), the Members of the National Labor Relations Board (29 U.S.C. 153(a)), and the Commissioners of the Interstate Commerce Commission (49 U.S.C. 10301(c)), the Nuclear Regulatory Commission (42 U.S.C. 5841(e)), and the Consumer Product Safety Commission (15 U.S.C. 2053(a)). Under *Wiener* an implicit for-cause limitation on presidential removal presumably applies also to Commissioners of the Federal Communications Commission, the Securities and Exchange Commission, the Federal Election Commission, and the Commodity Futures Trading Commission. Appendix B to the Reply Brief for the Comptroller General compiles statutory provisions governing removal of independent officers.

porated in the Act. Key to the Act's bipartisan support was the adoption of an amendment by Senator Levin to ensure that, in implementing the budget reductions, no power be delegated to "undo the Congress' priorities" established in the budget. 131 Cong. Rec. S12944 (Oct. 9, 1985) (Sen. Levin); *see* Act, § 252(e); J.A. 134.

The Comptroller General's freedom from presidential removal at will is essential to his ability to "discharge [his Deficit Control Act] duties independently of executive control. . . . [f]or it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor*, 295 U.S. at 629. To guarantee the neutrality of the implementation of the Act, the Congress determined that the trigger mechanism could be administered only by an officer who performs no political duties and is independent of both Congress and the President "except in [his] selection, and free to exercise [his] judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625–26 (emphasis omitted).

B. The United States Misreads Humphrey's Executor

The Court's opinion in *Humphrey's Executor* does not support the Executive's cramped reading of the case, but to the contrary confirms that Congress may constitutionally restrict the removability of officers who perform a broader range of administrative tasks than the adjudication of "discrete transaction[s] or controvers[ies] affecting a particular private party." U.S. Br. 47. In *Humphrey's Executor* "[t]his Court saved [the FTC] from executive domination only by recourse to the doctrine that 'In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially.' " *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 488 (1952) (Jackson, J., dissenting) (quoting *Humphrey's Executor*, 295 U.S. at 628). The authority to

"fill[ ] in and administer[ ] the details" that the Court was discussing was its power "to prevent persons, partnerships, and corporations . . . from using unfair methods of competition in commerce." [10] The Court explained that Congress had created the FTC as "an administrative body . . . to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." 295 U.S. at 628. The reason that the FTC, in Justice Jackson's words, "escaped executive domination" was because "it exercises legislative discretions as to policy in completing and perfecting the legislative process." *Ruberoid Co.*, 343 U.S. at 488. Contrary to the claim of the United States, the Court did not sustain the FTC's independence from presidential removal solely because the FTC could conduct investigations for Congress or sit as a master in chancery, but importantly because Congress had delegated to the FTC the task of "filling in and administering the details" of the statute.[11]

This task of "filling in" a statute, upon which the Court predicated Congress' authority to restrict the President's removal of the Commissioners, is a quintessential example of "the performance of a significant governmental duty exercised pursuant to a public law." *Buckley* v. *Valeo*, 424 U.S. at 141. Nevertheless, the United States seeks to contract the actual scope of the Court's ruling in *Humphrey's Executor* by describing "the FTC's interpretation and application of the law as an incidental aspect of individual adjudicatory proceedings . . . [which] in our view . . . is more appropriately characterized for present purposes as 'quasi-judicial'." U.S. Br. 45 n.31. This conjec-

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[10] 295 U.S. at 620 (quoting § 5 of the FTC Act, 15 U.S.C. 45).

[11] Although in describing the FTC's authority to "fill in" the legislative standard, the Court used the term "quasi-legislative", 295 U.S. at 628, the Court did not employ this term in the same sense in which it used it when describing the FTC's investigatory functions. Investigatory duties are termed "quasi-legislative" because Congress can perform investigatory and reporting functions. However, the duty to "fill in" a statutory standard is termed "quasi-legislative" for the entirely different reason that it substitutes for more detailed legislation.

tured limitation on *Humphrey's Executor* does not explain the Court's express recognition of the FTC's power to initiate its cases by "issu[ing] a complaint stating its charges," 295 U.S. at 620, as well as to adjudicate cases. Moreover, the Commission's application of law is not "incidental" to its activities, but the very purpose of its initiation of civil enforcement proceedings.[12] The Executive's apparent attempt constitutionally to differentiate administrative enforcement by rulemaking from enforcement by adjudication is inconsistent with the Court's recognition "that 'the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.'" [13]

Further, although the FTC may not have conducted rulemaking prior to *Humphrey's Executor, see* U.S. Br. 45 n.31, this Court has subsequently established specifically that regarding rulemaking authority, "the President may not insist that such functions be delegated to an appointee of his removable at will." *Buckley,* 424 U.S. at 141. The Executive has acknowledged in this Court that "members of the independent regulatory commissions . . . can share, much as cabinet officers share, in the power granted by Article II to execute the laws." [14] The Court should adhere to its holdings, and the previous understanding of the Executive branch, that Congress may legislate limitations on presidential dismissal of officers performing administrative duties other than solely adjudicatory functions.

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[12] *See Ruberoid Co.*, 343 U.S. at 488–89 (Jackson, J., dissenting) (Congress created independent agencies such as FTC to exercise policy discretion in enforcing statutory standards).

[13] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

[14] Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae, Buckley* v. *Valeo*, at 121 n.78.

C. Humphrey's Executor Sustains the Comptroller General's Exercise of the Administrative Functions Delegated by the Act

The true issue after *Myers* v. *United States*, 272 U.S. 52 (1926), and *Humphrey's Executor* is the distinction drawn between two constitutionally distinguishable types of executive functions. In *Humphrey's Executor*, the Court recognized, on the one hand, that those agencies that can "be characterized as an arm or an eye of the executive" exercise "executive power in the constitutional sense." 295 U.S. at 628. In this category the Court placed the postmaster whose removal it had sustained in *Myers*, because "such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627. Similarly, the Court pointed out, in Congress' "decision of 1789," which the Court had relied upon in *Myers*, "the office under consideration by Congress was not only purely executive, but the officer [the Secretary of Foreign Affairs, now the Secretary of State] one who was responsible to the President, and to him alone, in a very definite sense." *Id.* at 631.

The Court recognized, on the other hand, that some agencies exercise "executive *function*[*s*]—as distinguished from executive *power* in the *constitutional* sense." *Id.* at 628 (emphasis added). Agencies like the Federal Trade Commission and the Interstate Commerce Commission are in this category, because "[t]he authority of Congress . . . to require them to act in discharge of their duties *independently of executive control* cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Id.* at 629 (emphasis added). Thus, the Court derived Congress' authority to limit the President's removal authority from Congress' power to require an officer to perform his duties independently of the Presi-

dent's control. Because Congress cannot require the President to relinquish control over the key political advisors and Cabinet officers who share in the exercise of the President's constitutionally conferred power, Congress similarly cannot restrict the President's ability to remove only those officers.

The Court grounded the distinction between those officers who exercise "executive power in the constitutional sense", and those other officers who perform executive duties under the direction of Congress' statutory directives, on *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). *Humphrey's Executor*, 295 U.S. at 631. In *Marbury* the Court observed that the Constitution invests the President "with certain important political powers, in the exercise of which he is to use his own discretion. . . . To aid him in the performance of those duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts. . . ." 5 U.S. at 165–66. The Court illustrated this category of executive officers with the Secretary of Foreign Affairs, who "is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated." *Id.* at 166. The Court contrasted such "heads of departments [who] are the political or confidential agents of the executive, merely to execute the will of the president," *ibid.*, with an officer whose delegation of statutory duties by Congress renders him "the officer of the law," *ibid.* Subsequently, in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838), the Court confirmed the *Marbury* distinction between "political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president," and other duties delegated to executive officers by Congress, which "are subject to the control of the law, and not to the direction of the president." The holding in *Humphrey's Executor* was grounded soundly upon the Court's conclusion, in reading this line of cases,

that FTC Commissioners, like the nonpolitical officers discussed in *Marbury*, are within the group of officials who are "not removable at the will of the President." 295 U.S. at 630–31.

The Comptroller General is neither "an arm or an eye of the executive," *id.* at 628, nor the President's "subordinate and aid," *id.* at 627. To the contrary, Congress mandated that the Comptroller General perform his duties "without direction from any other officer." Budget and Accounting Act, § 304; J.A. 95. Like FTC Commissioners, the Comptroller General is "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Humphrey's Executor*, 295 U.S. at 628. The Executive's claim that the role of the Comptroller General "is by no means 'wholly disconnected from the executive department'," U.S. Br. 48 (quoting *Humphrey's Executor*, 295 U.S. at 630), is flatly inconsistent with Congress' explicit establishment of the GAO, which the Comptroller General heads, as "independent of the executive departments," Budget and Accounting Act, § 301; J.A. 93.

The Executive's objection to the Comptroller General's independent performance of his duties is based on its view that "[a] more sweeping and pervasive connection between the Comptroller General's actions and the administration of the laws that are under the President's supervision and control can scarcely be imagined." U.S. Br. 48. The question, however, is not whether the Comptroller General's actions under the Deficit Control Act have a "connection" to the President or to executive departments, but whether under the Act the Comptroller General exercises "executive power in the constitutional sense." He does not. The Comptroller General does not perform constitutionally conferred executive functions,

for example, in the conduct of foreign relations or the command of the armed forces.[15]

To the contrary, the Comptroller General does not exercise "distinctively political judgment" of any kind under the Act. J.A. 54 (emphasis omitted). The United States confuses the statutory *effect* of the Comptroller General's actions on the level of funds available for expenditure by the government, with the constitutional *nature* of the Comptroller General's actions. The Comptroller General simply does not exercise "sweeping authority . . . over the operations of the departments and agencies of the Executive Branch." U.S. Br. 51. Instead, he exercises particularized, apolitical fact-finding duties,

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[15] One variant of the Executive's argument rests on its claim that the Act permits the Comptroller General to "direct the execution of the laws by the President," U.S. Br. 48, by the Comptroller General's "issuance of binding determinations directly to the President himself [, which t]he Act requires the President to implement . . . in a sequestration order," *id.*, 49. Although the Act provides for a presidential order incorporating the Comptroller General's report, section 252(a)(1), (3), (b)(1); J.A. 124, 128, 132-33, the purpose of that step was only because, as "the Chief Executive officer of the country," the President "can enforce what he is supposed to do," 131 Cong. Rec. S12703 (Oct. 5, 1985) (Sen. Rudman).

Before the district court the United States made clear that its objection "is one limited to the personal office of the President and not everyone in the executive branch. If this statute had provided for sequestration orders to be issued by the Secretary of the Treasury, we wouldn't be making this argument." Transcript of District Court Argument, Jan. 10, 1986, at 62. This objection need not precipitate a constitutional issue, but can be resolved by the President's use of his general delegation authority to delegate this duty to a subordinate officer. 3 U.S.C. 301. When the Congress assigns a delegable duty directly to the President rather than to a subordinate officer, such as the Secretary of the Treasury, it enhances the power of the President over the organization of the government, because the President may unilaterally determine where within the Executive branch to place the responsibility to perform the duty.

to which Congress has statutorily given significant effect.[16]

For that reason, the assignment to the Comptroller General of the triggering function in the Act does not raise the threat that the United States fears that Congress may usurp the President's authority by vesting control over Executive powers in independent officers. The same law that established the Comptroller General's office created the Bureau of the Budget, the forerunner of the Office of Management and Budget, and charged it with the duty to assemble and to revise the budget requests of the Executive departments in order to prepare the federal budget on behalf of the President. Budget and Accounting Act, § 207, 42 Stat. 22. Because of the nature of those duties, the Director of the Budget Bureau, unlike the Comptroller General, was intended to function "under the immediate direction of the President." H.R. Rep. No. 14, 67th Cong., 1st Sess. 6 (1921). Recognizing that the Budget Bureau was to be "the mere agency of the President in exercising these powers," *ibid.*, the Congress respected the President's right to remove the Bureau's Director at will. Today this Court's decisions similarly establish that the Director of the Budget Bureau's successor agency, OMB, serves at the President's pleasure. Upholding the constitutionality of the Deficit Control Act would not alter the President's ability to control the

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[16] The United States argued identically before the district court that no other independent agency exercises authority "that is nearly as broad or sweeping and affects levels of spending for the Department of Defense and all executive agencies." Transcript of District Court Argument, Jan. 10, 1986, at 72. Judge Scalia responded,

> You say it affects it. Actually, the Comptroller General is given very, very little power. . . . [T]he fact that its effects may be sweeping is a consequence of congressional action; it is a consequence of the statute. Because of his prediction, the President has to cut various budgets a certain amount. But actually, what the Comptroller General has to do here is, you know, it is something for a guy with a green eye shade.

Ibid.

preparation of his budget with the assistance of his advisors, to advocate the adoption of that budget with their aid, or to administer the obligation of budgeted funds within the deficit ceiling that the joint action of the Congress and the President has made binding by law.

III. THE PROPER APPLICATION OF THE FALLBACK PROVISION MUST BE GOVERNED BY CONGRESSIONAL INTENT

In our opening brief (at 31–43) we explained that, if the Comptroller General's duties under the Deficit Control Act are incompatible with the removal provision in the Budget and Accounting Act, then the Court must determine which provision to sever. Because this severability question presents a question of legislative intent, we marshaled the historical evidence that Congress would have both established the Comptroller General's office in 1921 and delegated to him the administrative duty of triggering the deficit-reduction mechanism in 1985, irrespective of the statutory provision permitting removal of the Comptroller General by joint resolution. In response, the appellees rely almost exclusively and mechanically on the fallback provision contained in section 274(f) of the 1985 Act, J.A. 165–66, to contend that severing the legislative removal provision in the 1921 Act would be "contrary to the express desire of Congress, which specified what was to happen in the event Section 251 was held unconstitutional." U.S. Br. 56. Adhering to our understanding that both severability and the use of the fallback provision must be governed by congressional intent, we will discuss their application to the three principal claims against the constitutionality of the Act.

1. The fallback provision should be invoked if the plaintiffs are correct that the Act unconstitutionally delegates legislative power. If the Court holds that the Congress may not delegate deficit reduction powers to any administrative official, then the constitutional characteristics of the official designated in the Act would be of no consequence. Deficit reduction could be achieved only through annual legislation, such as under the fallback provision.

2. If the Court were to sustain the claim of the United States that the Comptroller General cannot perform his assigned duties because he does not serve at the President's pleasure, then adherence to the intent of Congress would require the Court to invalidate the reporting mechanism and permit the fallback mechanism to operate. The Congress sought to take the Act's administrative determinations "out of the hands of the President and the Congress." 131 Cong. Rec. H9846 (Nov. 6, 1985) (Rep. Gephardt). If the Constitution does not permit the Congress to safeguard the Act's administration from political control by delegating the Act's responsibilities to an independent officer, then we agree that the Congress would not have created the administrative mechanism. The fallback mechanism must then be used.

3. However, the fallback mechanism is not the constitutionally or statutorily required consequence of a ruling that the Comptroller General may not be removed by a joint resolution of the Congress under the 1921 Budget and Accounting Act. If the issue is ripe, *but see Ameron*, slip op. at 17–18, severance of the 1921 removal provision would not impair the intent of Congress in 1985 that the Comptroller General's functions under the Deficit Control Act be performed independently of both the Congress and the President. In our brief (at 40) we stated that there was no evidence in the legislative history of the Deficit Control Act that the Congress viewed the removal provision as relevant to the legislation; none of the appellees or amici has pointed to any such evidence. In these circumstances, the intent of Congress, which must guide any decision on severability, would be served only by severing the dormant 1921 removal provision and preserving Congress' present and critical determination that a standby procedure administered by an independent official is essential to assuring deficit reduction.

CONCLUSION

For the reasons stated in this reply and in our opening brief, the declaratory order of the district court should be reversed.

Respectfully submitted,

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April 1986.

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ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 85-5226 & 85-5377

AMERON, INC.
and
UNITED STATES SENATE, Intervenor

Thomas P. O'Neill, Speaker of
House of Representatives and
Bipartisan Leadership Group,

Intervenors

Appellee

v.

U.S. ARMY CORPS OF ENGINEERS; LT. COL.
MICHAEL K. COLLMEYER, CONTRACTING OFFICER,
UNITED STATES OF AMERICA; AND SPINIELLO
CONSTRUCTION COMPANY

United States of America,

Appellant

Appeal from the United States District
Court for the District of New Jersey
(D.C. No. 85-1064)

Argued October 29, 1985
BEFORE: GARTH, and BECKER, *Circuit Judges*
and HUYETT, *District Judge**

(Opinion filed March 27, 1986)

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*Honorable Daniel H. Huyett, 3rd, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GARTH, *Circuit Judge*:

This appeal presents, in a rather prosaic setting, a problem of profound constitutional significance concerning the division of power among the three branches of our federal government. At issue is the constitutionality of the automatic stay provisions of the Competition in Contracting Act (CICA), Pub. L. No. 98-369, Subtitle D, 98 Stat. 1199-1201, codified at 31 U.S.C.A. § 3553 *et seq.* (West Supp. 1985). The United States Army Corps of Engineers and the other executive department defendants [hereinafter referred to collectively as the Army] appeal from a decision of the district court declaring the CICA stay provisions to be constitutional and ordering broad injunctive relief to plaintiff Ameron and the Congressional intervenors.

We now affirm the district court's holding that the Comptroller General, as head of the General Accounting Office, is an independent official with duties involving both the legislative and executive branches of the United States government. As such, he may constitutionally exercise the powers conferred upon him by CICA. We also conclude, however, that the injunction granted by the district court was broader than necessary to grant the full relief to which plaintiffs were entitled, and therefore modify the injunction as specified below.

I.

A.

Congress created the General Accounting Office (GAO) and the Office of the Comptroller General by the Budget and Accounting Act of 1921, Pub. L. No. 13,

§ 301, 42 Stat. 20, 23. The 1921 Act was the culmination of Congressional efforts over many years to provide accountability for the federal government's finances. The original Comptroller of the Treasury was an executive officer within the Treasury Department. 1 Stat. 65-66 (1789). The Comptroller continued as an executive officer with executive functions under subsequent enactments. *See, e.g.*, Act of March 3, 1817, 3 Stat. 366; Dockery Act of 1894, 28 Stat. 162, 205.

When they were created to replace the Comptroller of Treasury, the GAO and the Comptroller General were initially empowered to report to Congress and assist Congress in the budget process. 1921 Act, §§ 304-312, 42 Stat. 23-26. Even in 1921, however, the Comptroller General, even though created in part to assist Congress, was assigned duties that were not traditionally "legislative": auditing and settling public accounts, countersigning treasury warrants, prescribing "the forms of keeping and rendering all public accounts" -- these and other executive duties were given to the GAO and the Comptroller General by the 1921 Act, which also abolished the Comptroller of the Treasury. §§ 301, 304, 310. The parties do not dispute that the Comptroller General continues to perform significant duties that are both "legislative" and "non-legislative," i.e., executive, in nature.

As an adjunct of its account-settling role, the Comptroller General over the years began to hear protests from disappointed bidders on government contracts. *See Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1313 (D.C. Cir. 1971). This role was formalized by the Competition in Contracting Act (CICA) in 1984. 31 U.S.C.A. §§ 3351-3356 (West Supp. 1985). CICA was enacted to remedy a major loophole in the long-standing GAO review procedure: by the time the GAO reviewed most bid protests, the protests had

become moot because either the contract had been let or the contractor was engaged in performing under the contract. While GAO regulations provided for a stay of either the granting or performance of the contract in some circumstances, *See Merriam v. Kunzig*, 476 F.2d 1233, 1236 & n.1 (3d Cir. 1973), this stay was easily overridden by the contracting agency involved. The result was that most procurements became *faits accomplis* before they could be reviewed. This situation was identified by Congress as a contributing factor to the crisis of waste in federal procurement. In particular, Congress recognized as a problem that of $168 billion in government contracts awarded in fiscal year 1983, only about one-third, $54 billion, was awarded on a competitive basis. *Competition in Contracting Act of 1984*: H.R. Rep. No. 1157, 98th Cong., 2d Sess 12 (1984). In enacting CICA, Congress attempted to provide effective review of bid challenges, and in the process to encourage competition in contracting. *See* Opinion of District Court, slip op. at 31.

In relevant part, CICA permits a potential or actual bidder who disputes the terms or awarding of a government contract to challenge the procurement or the award of the contract by filing a protest with the Comptroller General. Upon receiving the protest, the Comptroller General must "within one working day" notify the agency involved, which must then make a report on the challenged contract. 31 U.S.C. § 3353(b)(1).

The filing of a protest freezes, or stays, the awarding of the contract or any action under it until either the Comptroller General makes a decision on the protest or the agency head certifies in writing that "urgent and compelling circumstances which significantly affect interests of the United States"

require that the contract be awarded, 31 U.S.C. § 3553(c)(2), or that "the best interests of the United States" require that performance proceed under a contract already awarded by the agency. 31 U.S.C. § 3553(d)(2).

The Act requires the Comptroller General to issue a final decision on the protest within 90 working days unless he determines in writing that the circumstances of the protest require more time. 31 U.S.C. § 3554(a)(1). The Comptroller General may also exercise an "express option" to expedite review of certain cases within 45 calendar days, 31 U.S.C. § 3554(a)(2), and may dismiss patently frivolous or meritless claims on a summary basis. 31 U.S.C. § 3554(a)(3).

The power of the Comptroller General in rendering his decision is limited to a *recommendation* that the agency, *inter alia*, terminate or rebid the contract, issue a new solicitation, refrain from exercising options under a contract, or award a different contract consistent with law. 31 U.S.C. § 3554(b)(1). The only affirmative power provided to the Comptroller General is to award a prevailing protester its bid and proposal preparation costs, as well as its costs and attorneys' fees in filing and pursuing the bid protest. 31 U.S.C. § 3554(c)(1).

President Reagan signed CICA into law as part of the omnibus Deficit Reduction Act of 1984, but he declared the automatic stay provision unconstitutional upon the advice of the Attorney General and ordered the executive department not to observe it. Accordingly, the Office of Management and Budget issued instructions to executive agencies to proceed with the procurement process "as though no such [stay] provisions were contained in the act." OMB Bulletin No. 85-8 at 2 (Dec. 17, 1984).

B.

The mundane facts underlying the present controversy belie the compelling nature of the constitutional question before us. In late 1984, Ameron submitted a bid on a proposed contract to clean and repair sewer lines at West Point, New York. The Army's "Invitation for Bids" required an interested party to submit along with its bid a bond guaranteeing 20 percent of the bid amount. When the sealed bids were opened, Ameron was the apparent low bidder with an offer of $1,033,000, about $200,000 less than the next lowest bidder, defendant Spiniello Construction Company. However, Ameron's bid was rejected because the dollar amount of the bond had been altered without any indication that the surety had agreed to be bound by the change. Although Ameron contended that the change was merely the result of a typist's error,[1] the agency rejected Ameron's bid as non-responsive to the terms of the invitation and awarded the contract to Spiniello. *See* Affidavit of Michael K. Collinger at 1-2.

On March 1, 1985, within ten days of the awarding of the contract, Ameron filed a protest with the Comptroller General, claiming that the Army had wrongfully rejected its bid. Three days later, Ameron filed suit in federal district court claiming that the Army had arbitrarily rejected its bid and seeking a preliminary injunction to restrain the Army and the victorious bidder from proceeding with the contract pending the outcome of Ameron's protest to the Comptroller General. Ameron also sought a temporary restraining order enjoining performance of the contract.

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1. The original typed bond amount of $1,200,000 was "whited-out" and the bond amount of $3,000,000 was typed over the corrected portion of the bond document. App. at 8-9.

The district court first denied the request for a temporary restraining order, and then granted it on March 7, 1985 when the stay provisions of 31 U.S.C. § 3353(d)(1) were brought to its attention, pending a hearing on the preliminary injunction to be held March 18, 1985. After hearing argument on March 18 and granting the motion of the Senate, the Speaker, and the Bipartisan Leadership Group of the House to intervene as plaintiffs to support the constitutionality of CICA, the district court eventually granted the preliminary injunction on March 27, 1985. 607 F. Supp. 962 (D.N.J. 1985).

In an oral opinion delivered from the bench, the court rejected Ameron's claim that the Army had acted arbitrarily. That ruling is not before us on appeal. The court concluded, however, that Ameron was entitled to a preliminary injunction enforcing a stay because the CICA stay provision was constitutional. The court held that Congress could delegate the non-legislative power to lift the stay to the Comptroller General because he was appointed by the President in accordance with the Appointments Clause of the Constitution, Art. II § 2, C1.2, and therefore was not merely an agent of Congress. *Id.* at 971-74. The Army filed a timely notice of appeal from the injunction ruling. A month later, on April 29, 1985, the Comptroller General issued a decision denying Ameron's protest on the merits.[2] The parties agreed that this did not render the case moot, and proceeded to file cross-motions for summary judgment.

The court thereafter denied Ameron's motion for summary judgment on the merits of its bid protest, but granted the motion of the intervenors for a permanent

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2. In essence, the Comptroller General held that it was not arbitrary for the Army to reject Ameron's bid due to the altered bond document.

injunction ordering the federal government to comply with and implement 31 U.S.C. § 3553. 610 F. Supp. 750 (D.N.J. 1985). We reproduce the full text of the court's order in the appendix.

The court also declared 31 U.S.C. § 3553 to be constitutional, and joined OMB Director David Stockman and Defense Secretary Casper Weinberger as necessary defendants. Although the injunction contains no language limiting its application to less than the entire federal government, it is apparent from the court's oral opinion that it intended its order to have controlling effect only within the District of New Jersey. *See id.* at 756. The Army appealed again, and the appeals (Nos. 85-5226, 85-5377) were consolidated for review by this court.

II.

At the outset, we must determine if this case was rendered moot by the disposition of Ameron's original bid protest by the Comptroller General. Although the Comptroller General's decision lifted the stay provided by CICA, arguably obviating the need for an injunction, it is urged that this case is not moot. Even when no more relief may be granted to a plaintiff, a case may continue to decision and remain viable on appeal if the problem presented is "capable of repetition yet evading review." *See In re Kulp Foundry*, 691 F.2d 1125, 1128-29 (3d Cir. 1982). This standard applies if 1) the problem allegedly causing injury is resolved within too short a time period to ever be fully litigated and appealed, and 2) the party seeking relief is likely to be subject to the same injury in the future. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). *See also Roe v. Wade*, 410 U.S. 113, 125 (1973).

The parties agree that this case is an appropriate one for application of the rule, and we concur. A bid protest will usually be resolved within 90 days, so that

by the time a case can be appealed to this court, it will almost always face the prospect of being regarded as moot. Moreover, Ameron, as a company frequently seeking government contracts, represented that it is likely to be faced with a similar situation again: desiring to protest a contract decision but being unable to obtain the statutorily guaranteed stay while its protest is being reviewed. Lest the issue presented evade review, we hold that the present dispute is not moot, and we proceed to consider this case on the merits.

III.

As the Supreme Court observed in *Buckley v. Valeo*, 424 U.S. 1, 124 (1976), "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the Summer of 1787." The Constitution creates three distinct branches of government and vests specific powers in each. This design is intended to block tyranny by any one branch by providing a series of checks and balances to diffuse concentrations of power. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Nevertheless, the Court has rejected any notion that the branches are hermetically sealed. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon the branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *See*

Buckley, 424 U.S. at 121. Moreover, this court has recently emphasized that separation of powers analysis must focus pragmatically on whether the challenged provision actually or potentially interferes with the ability of the affected branch to accomplish its constitutionally assigned functions. *In re The President's Commission on Organized Crime Subpoena of Nicodemo Scarfo*, No. 85-3023, slip op. at 11 (3d Cir. Feb. 14, 1986). *See also Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

In applying the separation of powers principle, which is not explicitly mentioned in the Constitution but which undergirds the Constitutional philosophy, the Court has more than once felt compelled to rein in one or another branch of government. The Court has held that Congress, as the legislative branch, may not delegate to itself or its agents executive or judicial power, *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928); that the executive may not exercise legislative power belonging only to Congress, *Youngstown*; and that executive and administrative duties of a non-judicial nature may not be imposed upon Article III judges. *United States v. Ferreira*, 54 U.S. (13 How.) 39, 50-51 (1852). *See generally President's Commission (Scarfo), supra*.

Moreover, the power of appointment and removal must be exercised in conformity with the separation of powers. Congress may not curtail the power of the President to remove purely executive officials, *Myers v. United States*, 272 U.S. 51 (1926), but may create agencies which exercise mixed duties whose members may be protected from removal by the executive without cause. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). Congress may not, however, retain for itself the power to appoint officials of the government who exercise executive power. *Buckley*, 424 U.S. at 126.

While disputing the application of these rules to the case at hand, the parties do appear to agree on one point: the key issue in this case is the characterization of the Office of the Comptroller General. If the Comptroller General, as the Army argues, is deemed to be an agent of Congress, then his possession of executive powers and duties is arguably unconstitutional. On the other hand, if he is an executive agent, then the performance of executive duties by the Comptroller would arguably create no constitutional problem.

The only other court that has addressed the question whether the Comptroller General may constitutionally exercise the powers granted under CICA concluded, following the reasoning of the district court in the present case, that the Comptroller could constitutionally exercise mixed powers. *See Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN, slip op. at 7-11 (C.D. Cal. Nov. 21, 1985).

In a recent decision, a three-judge panel in the United States District Court for the District of Columbia[3] held that certain provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act, were unconstitutional because they vested executive powers in the Comptroller General. *Synar v. United States*, No. 85-3945 (D.D.C. February 11, 1986). Under the *Synar* analysis, the Comptroller General was not permitted to exercise these powers under the Constitution. The court did not reach a firm conclusion regarding the characterization of the Comptroller General as an agent or member of a particular branch of the government, but concluded that executive power to mandate budget cuts could not

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3. The three-judge court was convened pursuant to 28 U.S.C. § 2284. *See Synar v. United States*, No. 85-3945, Slip op. at 5 n.1 (D.D.C. Feb. 11, 1986).

be delegated to "an officer removable by Congress." *Id.*, slip op. at 48.

In resolving the central question of characterization as it is presented on this appeal, we confront plausible arguments on both sides. Several factors weigh in favor of considering the Comptroller General to be an executive officer. Foremost among these factors is that the Comptroller General exercises significant executive functions in managing the accounts of the federal government and is appointed by the President -- factors which, in and of themselves, arguably render the Comptroller an "Officer of the United States" under *Buckley*, 424 U.S. at 126. The historic roots of the Comptroller's functions in the Treasury Department also militate against finding that the Comptroller is merely a legislative agent.

Against these factors, the Army marshals a great welter of dicta and conclusory statements to the effect that the Comptroller General is not an executive officer but rather an agent or member of the legislative branch. Several courts, first of all, have stated without extensive analysis that the GAO is an arm of the Congress. *See, e.g., McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1964). The Army also cites to numerous points in the legislative history of the 1921 Act and in other statutes where the GAO is characterized or labelled as a "legislative" agency. *See, e.g.*, 61 Cong. Rec. 1080 (Comptroller General "is to be the arm of the Congress": Rep. Good); *id.* at 1081 (Comptroller General is "representative of Congress" unlike Director of the Bureau of the Budget "who serves the President and is the personal representative of the President": Rep. Byrns); 2 U.S.C. § 701(e) (Comptroller General listed as within the

"Legislative Branch" in the Ethics in Government Act); 59 Stat. 616 (1945) (GAO stated to be part of legislative branch in Reorganization Act of 1945).

While we recognize the authority cited by the Army, we nevertheless cannot resolve the issue before us merely on the basis of the quantity of citation. We must beware of what Justice Cardozo described as "the tyranny of labels." *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934). Indeed, in *Buckley*, the Supreme Court specifically noted that "irrespective of Congress' designation [of the Comptroller General as a "Legislative Officer"], cf. 31 U.S.C. § 65(d), the Comptroller General is appointed by the President in conformity with the Appointments Clause [and therefore may exercise executive functions]." 424 U.S. at 128 n.165.

Instead of "decision by label," we must focus on function and reality. Clearly, the GAO and the Comptroller General perform legislative and non-legislative duties. Indeed, they also perform quasi-judicial functions. In that respect, they resemble the modern regulatory agency. Therefore, the mere recital by the Army of the Comptroller General's legislative functions, which involve investigating and reporting to Congress, does not make the Comptroller General an agent of the legislature.

In characterizing the Comptroller General as an agent of the legislature, the Army also stresses the power of Congress to remove the Comptroller from office. The Army argues that Congress may constitutionally remove only its own agents, i.e., members of the legislative branch, and that Congress therefore in reserving to itself the power to remove the Comptroller General had implicitly acknowledged that the Comptroller General is an agent of the legislature. By the same token, argues the Army, Congress must have recognized that the Comptroller General could not

be an agent of the executive, because Congress may not constitutionally remove from office agents who are purely executive in character.

To support this argument, the Army relies heavily on *Myers v. United States*, 272 U.S. 52 (1928), in which the Supreme Court held that the President's power to remove *purely* executive officers could not be curtailed by Congress. However, *Myers* was severely limited by *Humphrey's Executor*, in which the Court approved Congress's attempt to insulate members of the Federal Trade Commission from removal without cause by the President.

> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named [members of FTC, ICC and Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

295 U.S. at 629.

It is not clear whether Congress's power to limit removal by the President includes the power to retain to itself removal power over "mixed-power" officers of the United States. There are two questions implicated by the Army's argument on this issue, however, which must be addressed separately: (1) whether the provision permitting Congress to remove the

Comptroller General is constitutional, and (2) whether the mere existence of this provision renders the Comptroller General an agent of Congress for the purposes of this case.

A.

The first question is not ripe for review in this case at this time. Congress has never tried to remove a Comptroller General and is unlikely to do so in the foreseeable future. The constitutionality of the removal provison, therefore, has yet to be tested, and because Congress in this case has not sought to remove the Comptroller General, we do not deem the constitutionality of the removal provision to be justiciable. *See Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1100-01 (D.C. Cir. 1985).

By so holding, we decline to adopt the contrary conclusion reached in *Synar*, *supra*. In *Synar*, the court concluded that the issue of Congress' power to remove the Comptroller General was ripe for review, relying upon *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Supreme Court declared unconstitutional the delegation of Article III powers to bankruptcy judges not appointed in conformance with Article III. The district court in *Synar* held that since the Supreme Court had relied in part on the fact that bankruptcy judges could be removed for cause, the question of congressional removal power over the Comptroller General was similarly ripe for review. Slip op. at 29-30.

Northern Pipeline, however, does not control the present case. The Court struck down the statutory scheme in that case as facially violative of Article III, in that bankruptcy judges were appointed to fixed 14 year terms and could be removed for cause. Since the Court found that the judges therefore were clearly not Article

III judges under the plain language of the Constitution, the unconstitutionality of their appointment and exercise of power was immediately ripe for adjudication.

By contrast, in this case, there is no challenge to the *appointment* of the Comptroller General, which is agreed to be in conformance with the appointments clause, nor to the Comptroller General's 15 year statutory tenure. The only issue raised in this context is the constitutionality of the congressional *removal* provision, which has never been exercised in more than 60 years. Therefore, unlike *Northern Pipeline*, where the constitutionality question was ripe, here an additional act must be undertaken in order to meet the "ripeness" requirement. That act would be an attempted removal of the Comptroller General by Congress.

Moreover, even if the question were justiciable, and the provision granting Congress the power to remove the Comptroller General were found to be unconstitutional, that would only be *because* of a determination that the Comptroller General is indeed a member of the executive branch. The remedy in such a case would not be to hold the "stay" powers of the Comptroller General to be unconstitutional, but to sever as unconstitutional the provision which grants Congress the power to remove him. *See Myers*, 272 U.S. at 176.[4]

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4. The *Synar* court rejected a similar argument on the ground that it had no authority to "choose" whether to invalidate the Comptroller General's powers or Congress' removal power. In so doing, the court observed that courts faced with constitutionally incompatible statutes generally "set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." Slip op. at 32.

However, if the question of Congress' removal power is ripe in this case at all, than *a fortiori* it is also within the authority of the

B.

As to the second question -- whether the existence of Congress' power to remove the Comptroller General is determinative of the particular branch of which the Comptroller General is a member -- our answer is that the power of removal does not determine to which branch the Comptroller General belongs. Rather, if anything, it is the power of *appointment* that should control. *See Buckley v. Valeo*, 428 U.S. 1, 126 (1976). Moreover, the fact that the Comptroller General is not under executive control does not necessarily mean that he is under legislative control. Indeed, a practical analysis of how the Comptroller General and the GAO actually function reveals that the removal power vested in Congress is a power of limited importance. In more than 60 years of the GAO's existence, Congress has *never* exercised its power to remove a Comptroller General.

Viewed pragmatically, the Comptroller General functions independently of Congress in exercising his role of reviewing bid protests. There is no evidence in the record that Congress has *ever*, as a body or through individual members, exerted control over this process. With a 15-year, non-renewable term, the Comptroller General therefore appears to be one of the most independent officers in the whole of the federal government, and one whose functions are drawn from each of the branches. *See Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm.*

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court to declare that power unconstitutional, making a "choice" unavoidable. In the context of the present case, it would seem more logical to sever this never-used power rather than to strike down Congress' new statutory scheme in CICA. By contrast, in *Synar*, the court addressed a congressional scheme providing for "fallback" procedures in the event that the involvement of the Comptroller General in deficit reduction was deemed unconstitutional. *See* slip op. at 33-34.

on Legislation and National Security of the House Comm. on Government Operations, 99th Cong., 1st Sess. 35-36 (1985) testimony of Prof. Sanford Levinson [hereinafter cited as *Hearings*].

It is not surprising that, like many modern governmental units, the Comptroller General cannot neatly be labelled as totally the creature of one branch or another. This was recognized more than 20 years ago in *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94, 99 (D.D.C. 1964) *aff'd*, 339 F.2d 753 (D.C. Cir. 1964):

> The Comptroller General is the head of the General Accounting Office, 31 U.S.C. § 41. Unlike heads of most departments and establishments of the Government, he occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny to the Congress with appropriate recommendations. In addition he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House, in matters relating to revenue, appropriations or expenditures, 31 U.S.C. § 53. In performing these functions the status of the Comptroller General is that of an officer of the legislative branch of the Government. The Congress has comprehensive authority to undertake investigations in aid of legislation, or in connection with the appropriation of funds. Investigations are an aid to legislation and to the making of appropriations and are therefore auxiliary to the basic functions of Congress. The Congress may conduct investigations either through Committees or through an official such as the Comptroller General.

> The Comptroller General has also a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. § 71. This is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties. Humphrey's Executor v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L.Ed. 1611. Cf. Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. Thus we have developed in comparatively recent years a fourth type of Government agency, -- one that combines two kinds of basic powers.

Id. at 99-100 (quoted with approval by court below, 607 F. Supp. at 970-71). We adopt the reasoning of the court in *Brookfield Construction* that the GAO is best viewed as a part of a headless "fourth branch" of government consisting of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either.

The description of the Federal Trade Commission contained in *Humphrey's Executor* provides a close analogy for describing the GAO and the Comptroller General:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the

> law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts, "appointed by law and informed by experience." [citation ommitted].
>
> [The Commission is to be] "independent of any department of the government . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

295 U.S. at 624-25 (quoting statement of Senator Newlands).

The district court correctly followed *Brookfield Construction* in holding that the GAO is a hybrid agency of the kind described in *Humphrey's Executor* and that the Comptroller General may constitutionally exercise executive functions in reviewing bid protests because he is appointed pursuant to the Appointments Clause and performs executive duties. Although a legislative officer may not be given executive duties, many executive or "fourth branch" officers perform mixed duties and therefore function in dual capacities. As the Supreme Court noted in *Springer v. Phillipine Islands*, 277 U.S. 189 (1928):

> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive.

Id. at 202, quoted with approval in *Buckley*, 424 U.S. at 136-37.[5]

Our decision that both the GAO and the Comptroller General discharge their assigned functions with a measure of independence from both

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5. In contrast to our holding, the *Synar* court held that the Comptroller General's significant executive powers under the Gramm-Rudman-Hollings Act placed it in a "no-man's land" controlled by neither *Myers*, which concerned purely executive officers, nor *Humphrey's Executor*, which concerned officials exercising only incidental executive functions along with primarily quasi-legislative or quasi-judicial powers. Slip op. at 44. The *Synar* court then focused almost exclusively on the question of the removal power and, finding the retention of that power by Congress to be incompatible with the Comptroller General's exercise of executive budget-cutting functions, struck down the applicable parts of the Act.

Just as we have declined to follow *Synar* with respect to the constitutionality of Congress' removal power, we also decline to follow the approach taken by the *Synar* court here. The core principle of *Humphrey's Executor* was that Congress could create agencies exercising dual functions and which were independent of unfettered executive control. In their blend of powers and functions, the Comptroller General and the GAO closely resemble the FTC and other "fourth branch" agencies. There is, therefore, little basis for distinguishing *Humphrey's Executor* in the present case. We need not reach the question whether Congress might at some point violate the separation of powers by assigning to the Comptroller General or some other official independent of executive control too great a preponderance of fundamentally executive powers or functions. This is not such a case.

We do note, however, that the result in *Synar* seems to be based, at least in part, on the court's perception that "[i]t is not as obvious today as to it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies." Slip op. at 40. However, as noted *infra* at note 6, the principles underlying *Humphrey's Executor* have been widely accepted for half a century. We do not read *INS v. Chadha*, 462 U.S. 919 (1983) to the contrary or as undercutting these principles.

the legislative and executive branches undermines the Army's reliance on *Buckley* and *Chadha*. In both of those cases, the legislature usurped the executive's power by subjecting agency actions to direct political control. In *Buckley*, it did so by appointing members of the Federal Election Commission. In *Chadha*, it did so by ordering the deportation of an alien by a resolution not passed by both Houses or presented to the President. Here, no political, i.e., legislative control is being asserted over any executive prerogative; an additional executive power or non-legislative function has merely been assigned to an agency which from its inception has been functionally independent of political control.[6]

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6. Although the issue is not squarely presented by this case, we have not been unaware of the current public debate over the constitutionality of the entire scheme of independent agencies constituting the "fourth branch." In particular, we recognize that Attorney General Meese has questioned whether agencies exercising executive power may be kept independent of presidential authority. *See A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3.

We note that the constitutionality of independent agencies has been settled for half a century. *See* Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). However, to the extent that the Attorney General finds constitutional support for his assertion that every agency must be considered a part of a particular branch of government, this argument may cut against the Army's position in this case. In a September 13, 1985 speech reported in the New York Times, the Attorney General said: "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or "independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government." N.Y. Times, *supra*, at B8, col. 5-6.

Since it is undisputed that the Comptroller General and the GAO perform significant executive functions along with their legislative functions, the Attorney General's view would seem to regard them as part of the executive branch, a position contrary to the Army's argument in this case.

It must not be overlooked that through CICA, the act in question here, Congress has given the Comptroller General no ultimate veto over government appropriations. It has done no more than to furnish the Comptroller General with a tool to prevent *faits accomplis* and to encourage competition in contracting. The power of the contracting executive agency to override the stay in important circumstances provides a safety valve for any possible abuse by the Comptroller General. Most importantly, the long history of independence of the GAO supports the district court's view that the stay provision does not operate to permit intrusion by the legislative branch into executive or judicial decision making. Thus, the delicate balance of power among the branches of government has not been endangered or upset by our answer to the second question which we posed: that the mere existence of the power of Congress to remove the Comptroller General does not render the Comptroller an agent of Congress for the purpose of this case.[7]

IV.

Although we hold that the district court properly upheld the constitutionality of the Comptroller General's stay powers, the Army argues forcefully that the injunction granted was unnecessarily broad. We recognize that the Army in so arguing must overcome the considerable discretion granted to the district court in framing injunctions. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). The trial court must be given leeway to fashion effective remedies to correct offenses

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7. Because we hold that the Comptroller General is not exclusively a legislative agent, we need not reach the questions of whether the automatic stay could survive as a "report and wait" provision and whether, if unconstitutional, the Comptroller General's stay-lifting power is severable.

to the Constitution. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1521 (D.C. Cir. 1984) (en banc). Nevertheless, injunctive relief should be no broader than necessary to provide full relief to the aggrieved party. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The Army argues that the district court attempted to require observance of the CICA stay provisions on a "government-wide" basis, i.e., nationally. On its face, the court's order contains no limiting language to rebut this reading. However, it is apparent from the court's oral opinion that it intended to order the federal government to observe CICA only within the District of New Jersey -- the court's proper jurisdiction. *See* 610 F. Supp. at 756. Nevertheless, we agree that the injunction, even thus construed, went beyond that which was necessary to secure Ameron's rights.

There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the CICA stay provision. *See Chadha*, 462 U.S. at 940.[8] To the extent, then, that the court declared CICA to be constitutional, the Congressional intervenors had standing to obtain the relief granted. However, the intervenors lack their own standing to obtain an injunction forcing compliance with the law. Nothing in the Ameron controversy gives Congress a direct "stake" in the enforcement of CICA. Once a law is passed and

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8. *Chadha* actually only held that Congress properly intervenes to defend its statute when both plaintiffs and government defendants agree that a statute is unconstitutional, i.e., when there is no one to speak for the constitutionality of the statute. Here, where Ameron argued that the statute was constitutional, arguably there is less need to recognize Congress's standing. However, the parties agree, and we concur, that Congress has standing to intervene whenever the executive declines to defend a statute or, as in this case, actually argues that it is unconstitutional.

upheld as constitutional, Congress's interest in its enforcement is no more than that of the average citizen. *See Moore v. House of Representatives*, 733 F.2d 946, 951-52 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985). An ordinary citizen, in turn, has no standing to obtain an injunction to enforce the law, absent a personal stake in such enforcement. *Allen v. Wright*, 104 S. Ct. 3315, 3326 (1984); *AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982). The Congressional intervenors, therefore, do not have *independent* standing to seek an injunction ordering the federal government to enforce CICA.

However, despite their lack of independent standing, the intervenors may be entitled to injunctive relief on the same grounds and to the same extent as was available to Ameron. *See Director OWCP v. Perini North River & Associates*, 459 U.S. 297, 302-305 (1982) (to the extent OWCP Director does not have separate standing, he may seek reversal of lower court decision on grounds available to nonappealing aggrieved party). The question then is: what relief was available to Ameron?

In the absence of a certified class action, Ameron was only entitled to relief for itself. *National Center for Immigrant Rights v. INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984); *Davis v. Romney*, 490 F.2d 1367, 1366 (3d Cir. 1974). While the district court's entry of a declaratory judgment of constitutionality[9] may serve as precedent for subsequent cases, an injunction directing the Army Corps of Engineers to honor the stay provision of CICA only in this case provides full relief to Ameron. *See Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985) (striking down nation-wide injunction but leaving intact holding that regulation

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9. *See* Appendix to this opinion for the district court's order of May 20, 1985.

was invalid and grant of injunctive relief in plaintiff's case).

Ameron and the Congressional intervenors make several arguments in support of the broader relief granted. First of all, they argue that the Army never made any formal objection to the proposed scope of relief. We are not impressed with this claim, since the Army made clear during its colloquy with the district court that it objected to the broader injunctive relief granted. *See* May 28 transcript at 25-29.

More importantly, Ameron and the Congressional intervenors argue that the broader injunction was justified as a response to two expressions of defiance by the executive of each of its coordinate branches: First, the executive declared a duly enacted and signed law (CICA) to be unconstitutional and second, the executive intimated that it would not follow court decisions upholding that law.

As to the first issue, the record shows that upon the President's orders, the Attorney General instructed all executive agencies to ignore the stay provisions in CICA.[10] The Justice Department sought to justify this action as within the President's duty to defend the

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10. Pursuant to the Attorney General's instruction, the Office of Management and Budget issued OMB Bulletin No. 85-8 (Dec. 17, 1984), which required, *inter alia*, that:

> Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions [of CICA].
>
> With respect to the "stay" provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act. Pursuant to the provisions of the Federal Acquisition Regulations, the agency may voluntarily agree to stay procurements pending the resolution of bid protests, but the grant of such a stay must be based upon other valid authority and may not be based upon the invalid stay provisions of the Act.

Constitution: "[I]n the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the law requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land." *Hearings* at 318 (testimony of Acting Deputy Attorney General D. Lowell Jensen). *See also* Meese, *President's Right to Challenge Law*, N.Y. Times, May 21, 1985 (Letter to the Editor) Supp. App. at 180.

This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best.[11] The question of the President's

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Agencies shall comply with the provisions of 31 U.S.C. § 3553(b) concerning the submission of reports to the Comptroller General on protested procurements.

With respect to the damages provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General.

Agencies shall comply with 32 U.S.C. § 3554(e) concerning submission of reports to the Comptroller General on unaccommodated recommendations.

11. *See* Kendall v. United States, 37 U.S. 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissable.") The President's job is to execute law, not to create it. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). Moreover, "it is, emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Absent a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals, the President's asserted power and "duty" not to execute laws he finds to be unconstitutional is questionable. *See Hearings* at 39, 44 (testimony of Prof. Sanford Levinson); *id.* at 46-47 (testimony of Prof. Eugene Gressman).

actions, declarations, and purported refusal to order compliance with CICA, however, was not properly before the district court. Therefore, our task on this appeal is similarly limited to ruling only on the constitutionality of the statute before us, and on whether the remedy fashioned by the district court granted appropriate relief to the parties actually before the court. We are faced with no justiciable claim against the President stemming from an alleged usurpation of power.

The second challenged assertion of power by the executive branch is the threat of Attorney General Meese not to follow court decisions in this case. According to the Attorney General's testimony before the House's Committee on the Judiciary on April 18, 1985, the district court is not a "court of competent jurisdiction" to decide constitutional questions. Transcript of House Hearings at 24-25. Moreover, Mr. Meese declared the government's intention not to follow the district court's decision granting a preliminary injunction in Ameron until there was "an appellate decision." *Id.* at 31. Questioned further, Mr. Meese suggested that even a decision of this court -- the Court of Appeals for the Third Circuit -- might be ignored until the Supreme Court finally laid the matter to rest. *Id.* at 35-36. However, following the granting of permanent relief by the district court, the Army agreed to honor the stay provisions of CICA pending the disposition of this appeal. *See* Brief of Appellee-Intervenors Speaker and Bipartisan Leadership Group of the House of Representatives at 18-19.

In framing its relief, the district court was understandably concerned with the executive challenge to its power. The district court engaged counsel for the Army in a discussion regarding the district court's competence to rule on CICA's

constitutionality. In so doing, it elicited a concession that the court *did* have jurisdiction to rule on the question and to enforce its view through injunction in the District of New Jersey. May 28 transcript at 27. In its oral opinion, the court stressed its rejection of the executive's assertion of power to ignore an order of the district court and the suggestion of Attorney General Meese that the district court was not a court of "competent jurisdiction." 610 F. Supp. at 755-56.

It should be too obvious even to require restating that the district court, as an Article III court, has the power to rule on the constitutionality of an act of Congress and to impose appropriate remedies to compel compliance with an act found to be constitutional. That the executive in this case questioned this elementary principle did not, however, alter the specific task before the district court: to frame an injunction no broader than necessary to grant the full relief to which Ameron and the Congressional intervenors were entitled.

As Justice Douglas observed in his *Youngstown* concurrence, "[T]he emergency did not create power; it merely marked an occasion when power should be exercised." 343 U.S. at 629. Similarly, here, the felt need to reassert the constitutional scope of its power in the face of executive challenge did not create power in the district court that it did not already have, or change the judicial standards for the granting of injunctive relief. We therefore affirm the district court's obviously correct ruling that it is a court of competent jurisdiction to decide constitutional questions, even though we find the granted injunctive relief to be too broad under the circumstances of this case.

An injunction applying only to Ameron -- ordering application of the CICA stay provisions in Ameron's case -- would have provided Ameron with complete relief. While it was within the constitutional power of

the court to grant broader relief, jurisprudence governing injunctive remedies will not permit it. We therefore affirm the May 20, 1985 order of the district court,[12] except as to its final paragraph which we modify. *See Evans v. Buchanan*, 555 F.2d 373, 381 (3d Cir. 1977) (en banc). The final paragraph of the district court's order originally provided:

> FURTHER ORDERED that defendants U.S. Army Corps of Engineers, Caspar W. Weinberger and David A. Stockman are permanently enjoined from applying Federal Acquisition Circular 84-6 or OMB Bulletin No. 85-8 insofar as they conflict with 31 U.S.C. § 3553, and are permanently enjoined to secure the issuance of regulations which comply with and implement 31 U.S.C. § 3553.

We hold here that this provision granted relief broader than that to which Ameron was entitled. We therefore substitute for that provision in the district court's order the following language appropriate to the case before us:

> FURTHER ORDERED that defendants U.S. Army Corps of Engineers, Casper W. Weinberger, and David A. Stockman are permanently enjoined to comply with and implement 31 U.S.C. § 3553 in the case of Ameron, Inc.'s bid protest filed March 1, 1985.

V.

The May 20, 1985 order of the district court, as modified herein, will be affirmed in all other respects.

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12. *See* Appendix to this opinion for the full text of the original order of the district court.

APPENDIX

Text of District Court Order of May 20, 1985

This matter coming on to be considered by the court on application of Charles Tiefer on behalf of the Speaker and Bipartisan Leadership Group of the House of Representatives as plaintiffs-intervenors, and Morgan Frankel, on behalf of the Senate, plaintiff-intervenor, and it appearing from the papers submitted, the prior oral argument, the entire record in this case, and the Opinion of this Court filed on March 28, 1985, that there are no material facts in genuine dispute regarding the issue of the constitutionality of the stay provision in the Competition in Contracting Act, 31 U.S.C. § 3553, and that plaintiff and the intervenors are entitled to judgment as a matter of law, and for good cause

It is on this 20th day of May 1985:

ORDERED that in issuing its Opinion filed March 28, 1985, and in issuing this Order, this Court has been exercising the historic jurisdiction regarding the constitutionality of Acts of Congress, possessed by the Judiciary alone, of a court of competent jurisdiction;

FURTHER ORDERED that intervenors' motions for summary judgment be, and they are hereby granted; and it is

FURTHER ORDERED that 31 U.S.C. §§ 3353 be and it is hereby declared to be constitutional; and it is

FURTHER ORDERED that defendants U.S. Army Corps of Engineers, Caspar W. Weinberger and David A. Stockman are permanently enjoined from applying Federal Acquisition Circular 84-6 or OMB Bulletin No. 85-8 insofar as they conflict with 31 U.S.C. § 3553, and

are permanently enjoined to secure the issuance of regulations which comply with and implement 31 U.S.C. § 3353.

/s/ Harold A. Ackerman
HAROLD A. ACKERMAN
U.S.D.J.

Becker, *Circuit Judge*, concurring in part:

I join in Parts II and IV of the majority's opinion, and in its judgment. I disagree fundamentally with the majority's analysis in Part III however, and write separately to explain my views.

I.

Central to the majority's finding that CICA is not unconstitutional is its conviction that the Comptroller General occupies an indeterminate place in our constitutional scheme, belonging to neither the legislative, nor the executive, nor the judicial branch. Relying on *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964), *aff'd.*, 339 F.2d 753 (D.C.Cir. 1964), the majority states that "the Comptroller General cannot neatly be labelled as totally the creature of one branch or another," Maj. Op. at 27, and that "the GAO is best viewed as a part of a headless 'fourth branch' of government." *Id.* at 28.

Having thus severed the Comptroller General from any constitutional moorings within one of the three branches of government, the majority argues that because the GAO and the Comptroller General are "functionally independent of political control," *id.* at 31, and because the GAO has a "long history of independence," *id.* at 32, the powers granted the Comptroller General are not unconstitutional.

According to the majority: "the delicate balance of power among the branches of government has not been endangered or upset [by the provision of CICA permitting congressional removal for cause of the Comptroller General]," *id.*, and CICA is thus constitutional.

In my view, the majority's argument has gone awry on its very first step, its refusal to place the Comptroller General in one branch of government or another. The Constitution establishes three branches of government, not four. Moreover, because ours is a government of enumerated powers, there can be no branch of government not established by the Constitution. It therefore follows that there can be no fourth branch, headless or otherwise.

I admit that scholars often refer to administrative agencies as the "fourth branch" of government. *See, e.g.*, Strauss, *The Place of the Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984). The Supreme Court, however, has not acknowledged that administrative agencies, even the so-called independent regulatory agencies, belong to a category all their own. To the contrary, the Supreme Court continues to frame its separation of powers analyses in the context of the familiar triumvirate of branches. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."); *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (in analyzing the constitutionality of the powers of the Federal Election Commission, an "independent" administrative agency, the Court referred to the "fundamental principles of the Government . . . that the powers of the three great branches of the National Government be largely separate from one another.").

The majority's insistence on a fourth branch, while perhaps intellectually fashionable, is thus contrary to the jurisprudence of the Supreme Court.[1]

I do not deny that administrative agencies are and must be part of our government, and I do not suggest that they lack legitimacy simply because they were not envisaged by the Founding Fathers. Administrative agencies developed as a response to the needs of a complex society, and so long as our society remains as complex as it is, we shall need them. My point is simply that courts engaged in constitutional analysis must work within the framework established by the Constitution, and the Constitution does not allow for any more than three branches of government. If the administrative agencies cannot fit within this framework then the framework should perhaps be changed, but if this is to be done it must be by constitutional amendment, not judicial disregard of the present Constitution. Even a living constitution cannot grow a new branch.

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1. Although in FTC v. Ruberoid Corp., 343 U.S. 470 (1952), Justice Jackson did refer to administrative agencies as "a veritable fourth branch," *id.* at 487 (Jackson, J., dissenting), that was merely descriptive; Justice Jackson was hardly setting it forth as part of a new framework for constitutional analysis. Indeed, his qualification of the description -- "a *veritable* fourth branch" -- suggests that he did not intend to be taken literally.

   The only other occasions on which any member of the Supreme Court has used "fourth branch" in an opinion when referring to administrative agencies have also been in dissents and have been similarly off-hand and descriptive, rather than analytic. *See* Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216, 1219 (1983) (White, J., dissenting); *INS v. Chadha*, *supra*, 462 U.S. at 984 (White, J., dissenting) (quoting FTC v. Ruberoid, *supra*).

In analyzing the case before us, our first task must therefore be to decide to which of the three branches of government the GAO belongs. The next step in the analysis is to classify the powers conferred on the Comptroller General by the allegedly objectionable provisions of CICA. Only then can we decide whether those powers violate the Constitution.

II.

A.

Because the office of the Comptroller General is created by statute, the Comptroller General's status within the government is a matter of statutory interpretation which, like all statutory interpretation, is controlled by legislative intent. *Paskel v. Heckler*, 768 F.2d 540, 543 (3d Cir. 1985); Murphy, *Old Maxims Never Die: The "Plain Meaning" Rule and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299, 1299 (1975). There is copious evidence in the legislative history that the GAO (and therefore the Comptroller General) was intended to be in the legislative branch. This evidence is summarized concisely by the majority, and there is no need to repeat it here. *See* Maj. Op. at 19-20; *see also* Maj. Op. at 19 (citing cases that arrive at the same conclusion). Because there is no evidence of legislative intent to the contrary, I believe that it is incumbent upon us to hold that the Comptroller General is within the legislative branch of government, despite the inconveniences that may attend such a holding.

The majority's reluctance to classify the Comptroller General as legislative stems from two sources: (a) the fact that certain of the Comptroller General's functions are executive in nature, *see infra* at 6-7, and (b) the fact that the Comptroller General is appointed by the President. *See* Maj. Op. at 18-19.

Although both of these facts are relevant to the question whether any of the statutes affecting the Comproller General unconstitutionally violate the principle of separation of powers, *see infra* 10-12, neither is relevant to the logically prior question: to which branch does the Comptroller General belong? As I have noted, because the office of the Comptroller General is created by statute, his status must be determined by the legislative intent.[2] In this case, the legislative intent is clear -- he belongs to the legislative branch.

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2. The Senate argues in its brief that the fact that the Comptroller General is appointed by the President precludes his being part of the legislative branch. In making this argument, the Senate relied on Buckley v. Valeo, 424 U.S. 1 (1976). *See also* Maj. Op. at 19 (citing *Buckley* for the proposition that the executive functions of the Comptroller General and his appointment by the President "arguably render the Comptroller an 'Officer of the United States,'" *i.e.*, a member of the executive branch.). This reliance is misplaced, for *Buckley* never suggested that all those appointed by the President are necessarily members of the executive branch of government. *Buckley* held that only those appointed by the President could be "Officers of the United States," but we are concerned here with the obverse problem, never contemplated by *Buckley*, whether all those so appointed are necessarily Officers of the United States.

The only reference in *Buckley* to the Comptroller General came in a footnote in which the Supreme Court rejected an analogy between the members of the Federal Election Commission (who were not appointed by the President) and the Comptroller General. The Court said that "irrespective of Congress' designation [of the Comptroller General as a legislative officer], the Comptroller General is appointed by the President in conformity with the Appointments Clause." Buckley v. Valeo, *supra*, 424 U.S. at 128 n.165. This offhand reference is not sufficient to support the Senate's point that appointment by the President with the advice and consent of the Senate automatically makes one a member of the executive branch. The *Buckley* Court intended to

B.

Having determined that the Comptroller General is a member of the legislative branch, the next step in the analysis is to determine whether CICA grants the Comptroller General any functions that are executive or judicial rather than legislative. On this point, the parties agree that the following powers granted to the Comptroller General by CICA are not legislative: the powers to (i) review protests and issue recommendations on their adequacy, 31 U.S.C.A. § 3554 (West Supp. 1985), (ii) lift the automatic stay imposed by the filing of the protest, *id.*, and (iii) demand attorneys fees and costs on a finding that the solicitation was unlawful, *id.*

I agree with the parties' conclusions. Although the meanings of "legislative," "executive," and "judicial" are somewhat indeterminate, I find it hard to believe that the powers listed above would fit under any of the more common understandings of "legislative power." In exercising these powers, the Comptroller General acts on a case-by-case basis; he applies law rather than makes it. The powers are executive, or even quasi-judicial, rather than legislative. Although in other contexts the distinction between executive and judicial would be quite important, here it is not, and I therefore pass over it. The important point, which no

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distinguish the Comptroller General from the members of the Federal Election Commission, not to establish a general rule for a situation that was not before it.

Not only is the Senate's reliance on *Buckley* weak, but there are counter-examples that disprove its thesis. There are undisputed legislative officers who are appointed by the President -- the Librarian of Congress, 2 U.S.C. § 136 (1982), the Public Printer, 44 U.S.C. § 301 (1982), and the Architect of the Capitol, 40 U.S.C. § 162 (1982). Thus, the manner of appointment cannot be dispositive.

party contests, is simply that the Comptroller General, a legislative officer, undeniably exercises non-legislative powers.

C.

The inquiry cannot end here. The three branches of government, although separate, are not airtight. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683, 703 (1974). The Supreme Court has adopted a flexible approach, and has expressly endorsed the eloquent language of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sanger*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

The doctrine of separation of powers thus allows for some overlap among the branches. It could scarcely be otherwise, for virtually every branch has members who perform work that can be characterized as belonging to another branch. In the judiciary, for example, the Chief Judge, Circuit Executive, and Clerk of this Court exercise administrative responsibility that is executive rather than judicial. Every legislator has aides who do similar administrative/executive-type work. Administrative agencies that are within the executive branch often engage in both rulemaking, which is legislative in character, and adjudication, which is, of course, judicial.

The proper question in the separation of powers context, therefore, is not merely whether members of one branch do work that falls within the description of

another. Rather, the question is whether, by that work, the branch to which those members belong infringes so substantially on the other branch that the infringed-upon branch cannot carry out its constitutionally assigned functions. This test was explicitly enunciated by the Supreme Court in *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 443: "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."

Even this test is not immediately accessible, for "constitutionally assigned functions" is not a readily definable term. Each branch has many constitutionally assigned -- or, at least, constitutionally permitted -- functions. To give definition to the term, it is therefore necessary to place the problem in context, that is, to identify the objectives to be served by the principle of separation of powers and see if those objectives are threatened by the Comptroller General's CICA-derived powers.

Although scholars may debate the intricacies and wisdom of separation of powers, the original intent of the Founding Fathers in creating our system of divided powers is very clear and can be briefly stated. The principal goal of the Founding Fathers in enacting a system of separated powers was the protection of individual liberties. The colonists had experienced virtual tyranny at the hands of all three branches in their recent histories, *see* G. Wood, *The Creation of the American Republic 1776-1787* 668-70 (1969); Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 369, 373-76 (1976), and had concluded that only by diffusing power within the government could individual liberty be preserved. Echoing Montesquieu, James Madison wrote "[t]he accumulation of all

powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Federalist No. 47 (Madison) *in The Federalist*, 373-74 (Hamilton ed. 1864); *cf.* Montesquieu, *The Spirit of the Laws*, 38 Great Books of the Western World 70 (Hutchins ed. 1952) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."). *See also Youngstown Sheet & Tube Co. v. Sanger*, *supra*, 343 U.S. at 635 ("the Constitution diffuses power the better to secure liberty") (Jackson, J., concurring).[3]

We are now in a position to ask the central question in this case: do the executive-judicial powers conferred upon the Comptroller General by CICA threaten to coalesce powers in one branch such that individual liberty -- in this case, the liberty of those in Ameron's position who bid for contracts covered by the CICA -- is threatened? I think not. Three factors in particular convince me that the threat is not severe. First, CICA permits the executive branch unilaterally to override the automatic stay by submitting to the Comptroller General a written statement of "urgent and compelling circumstances which significantly affect interests of the United States." 31 U.S.C.A. § 3553(c)(2)(A). Thus, there need be no severe effects on the prerogative of the executive as a result of the

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3. In *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 Seton Hall L. Rev. 435 (1974), Judge Gibbons develops the thesis that the three branches were not intended to work in isolation and that a more accurate portrayal of the system is one of dispersed but shared decisional responsibility in which at least two branches must always concur, thus providing reasonable protection against the tyrannical exercise of power by a single branch. On this theory it is not necessary to invent a fourth branch to remedy overlap in the scheme. Judge Gibbons also gives several examples, both early and recent, of how the system of separated powers protects individual liberties.

Comptroller General's powers.[4] Admittedly, § 3553(c)(2)(A) is not an executive *carte blanche*. The "urgent and compelling circumstances" must in fact exist, and I presume that this would be determined by a court of law -- the third branch. Nevertheless, the limitation on the Comptroller General's powers is real and diminishes the threat to the goals of separation of powers.

Second, Congress has no voice in the Comptroller General's day-to-day operations, and it holds no sword of Damocles over the Comptroller General's head. Congress' only power over the Comptroller General, its power of removal, is circumscribed because it requires a joint resolution of Congress, and must be for one or more of five specified reasons: permanent disability, inefficiency, neglect of duty, malfeasance, or conduct which is felonious or involves moral turpitude. 31 U.S.C. § 703(e)(1982). The joint resolution will likely be more difficult to pass than a majority vote in one house, and the five reasons, although not so narrow as to deny Congress any leeway, circumscribe Congress' power to some extent by providing a basis for judicial review of congressional removal. The result of this limitation is that, as a practical matter, Congress has not exercised, and probably will never exercise, such control over the Comptroller General that his non-legislative powers will threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves.

It is particularly instructive in this regard to compare this case with *INS v. Chadha*, *supra*, heavily relied upon by the Army. Although both cases involve

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4. At least the executive need not fear for its ability to extract itself from an exigent circumstance, e.g., a contract dispute that would threaten a vital defense contract in time of national emergency, or an environmental hazard or natural disaster.

an infringement by the legislative branch into the domain of the executive, the nature of the infringements are very different. The unicameral legislative veto struck down in *Chadha* had all the earmarks of a hastily considered, unjust bill of attainder: there was neither a published committee report nor a debate, but only a conclusory statement on the floor of the House by a single Representative. Congress made the decision to deport Chadha by an unrecorded vote. *Id.* at 926-27 (Opinion of the Court); *id.* at 963-64 (Powell, J., concurring). Here, by contrast, there is no direct congressional involvement, and consequently the danger sought to be avoided in *Chadha* -- the involvement of political passions in quasi-judicial proceedings -- is simply not present. Bidders like Ameron realistically need not fear significant and improper congressional involvement.

Finally, it must not be forgotten that the President appoints the Comptroller General. Although the power of appointment does not give the President continuing control over the Comptroller General, it does give the President the opportunity to put into that office someone who will be respectful of the prerogatives, and sympathetic to the problems, of the executive branch. Once again, this is a significant feature of the case before us that lessens the severity of the congressional infringement on executive powers and distinguishes this case from those, like *Chadha*, in which the infringement and threat to liberty is more severe.

III.

My analysis is in many ways similar to the majority's. For both of us, the independence of the Comptroller General from congressional control and the limited power of the Comptroller General over the President are central to our decision. The majority might thus contend that our differences are merely semantic, and that I toil under a "'tyranny of labels.'"

See Maj. Op. at 20 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (Cardozo, J.)). But the majority would be wrong. What is at stake is our adherence to the system of government established by the Constitution. It is essential that we write -- and think -- only in terms of the three branches, and that we permit no more than the terms of the Constitution, fairly interpreted, will allow.

I can only surmise that the majority was attracted to the concept of the headless fourth branch because of its fear that the Comptroller General, and all other "independent" administrative agencies, could not survive an analysis that allowed for only three branches of government. I have explained, *see supra* II.C., why I believe the concept of separation of powers is sufficiently flexible to accommodate the CICA. I assume that similar analyses would lead to the same results for most other administrative agencies, although I cannot be sure.[5] I am certain, however, that if some agency

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5. For example, it is conceivable, albeit unlikely at this late date, that someone might launch a separation of powers challenge to the adjudicatory procedures of the NLRB. Under my analysis, a court would consider the legislative history of the NLRB to determine to which branch it was intended to belong. Presumably, the answer would be that it belongs to the executive branch. Next, the court would consider whether its adjudicatory procedures were executive in nature, and would presumably conclude that they were not, but are, rather, judicial. Finally, the court would ask whether this exercise by the executive branch of judicial functions gave the executive so much power, or so intruded upon the vital functions of the judiciary, that individual liberties were threatened. In making this inquiry, the court would consider (i) how much power the President has over the NLRB's adjudicatory functions, and (ii) whether the functions are a significant intrusion upon the judiciary, or whether, on account of judicial review of NLRB decisions, the intrusion is not severe. This analysis suggests, I believe, that my approach would not eclipse the contemporary regulatory scheme.

powers cannot fit within a government of three branches, or if certain legislation permitting one branch to affect the affairs of another cannot be countenanced within the three-branch framework, then those agency powers and that legislation must fall. The judiciary cannot invent a fourth branch to house them. Otherwise, we risk the very tyranny the Founding Fathers sought so ingeniously to avoid.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 85-5226 & 85-5377

AMERON, INC.
and
UNITED STATES SENATE, Intervenor

Thomas P. O'Neill, Speaker of
House of Representatives and
Bipartisan Leadership Group,

Intervenors

Appellee

v.

U.S. ARMY CORPS OF ENGINEERS;
LT. COL. MICHAEL K. COLLMEYER,
CONTRACTING OFFICER, UNITED STATES
OF AMERICA; AND SPINIELLO
CONSTRUCTION COMPANY

United States of America,

Appellant

Appeal from the United States
District Court for the
District of New Jersey
(D.C. No. 85-1064)

Argued October 29, 1985

BEFORE: GARTH, and BECKER, *Circuit Judges*
and HUYETT, *District Judge**

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*Honorable Daniel H. Huyett, 3rd, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above-captioned case, filed March 27, 1986, be amended as follows:

1. On page two, fifth line from the bottom: change "Meyer" to "Meyner";

2. On page five, line five: do not capitalize the word "see";

3. On page five, line 17: add a period after the word "Sess";

4. On page five, line 20: omit the words "slip op. at 31" and substitute "607 F. Supp. 962, 973-74 (D.N.J. 1985)";

5. On page 11, line 14 of the first full paragraph under Part III: add a quotation mark after the word "resisted."; and

6. On page 27, line 17: delete the "&".

By the Court,

/s/Leonard I. Garth

Circuit Judge

Dated: April 4, 1986

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Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)